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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. ALBERT ALEXANDER CHAVEZ, and ELIZABETH CHAVEZ, Defendants and Appellants.	B259908 (Los Angeles County Super. Ct. No. VA117603)

APPEAL from a judgment of the Superior Court of Los Angeles County, John A. Torribio, Judge. Affirmed in part, reversed in part, and remanded.

Theresa Osterman Stevenson, under appointment by the Court of Appeal, for Defendant and Appellant Albert Chavez.

Melissa Hill, under appointment by the Court of Appeal, for Defendant and Appellant Elizabeth Chavez.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Paul M. Roadarmel, Jr., Supervising Deputy Attorney General, and Connie H. Kan, Deputy Attorney General, for Plaintiff and Respondent.

A jury convicted defendants and appellants Albert and Elizabeth Chavez (defendants) on robbery and attempted murder charges. The prosecution presented evidence at trial to prove defendants robbed five victims at a Norwalk, California pawnshop in September 2009, assisted by a second man. Albert[1] shot the owner and one of the employees, inflicting great bodily injury on both. The prosecution also presented evidence to show defendants were responsible for a second robbery, of four victims at a jewelry store in Whittier, California, that occurred roughly two months before the pawnshop robbery. In bifurcated proceedings following the jury's verdicts, the trial court found that Elizabeth committed the robberies in association with a criminal street gang. At sentencing, the trial court imposed long prison sentences—effectively, 236 years to life for Albert and 232 years to life for Elizabeth—based in part on multiple consecutive 25-to-life mandatory sentencing enhancements. We consider whether sufficient evidence supports defendants' convictions and the true findings on certain sentencing enhancements, whether the court's jury instruction on a "kill zone" theory of attempted murder was erroneous, and whether the sentences the trial court imposed must be reversed as contrary to statutory and constitutional guarantees.

I. BACKGROUND

A. Oasis Jewelry Robbery

On July 13, 2009, at about 11:19 a.m., two men and a woman robbed the Oasis Jewelry store in Whittier. The robbery began when a man and a woman, identified two years later as Albert and Elizabeth, walked into the store. They propped open the door, and both pulled out guns. Elizabeth was wearing a red wig and holding a "distinctive" light blue bag. Elisa Castro (Elisa), who was working the back of the store with Manuel Castro (Manuel), believed she had seen the first male robber about a month or so before the robbery. He came into the store one day looking for a ring for his girlfriend. Elisa showed him some rings, but he left without buying anything.

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[1] Where individuals share a common surname, we use first names for clarity.

Arturo Castro (Arturo) and Reyes Juarez Lopez were working in the front of the store when defendants entered. Elisa and Manuel came out from the back of the store after defendants were inside. Albert pointed his gun at Arturo, then at Manuel, and told them to open the display cases. Neither could find the keys, however, and Albert told Manuel "to get the fuckin' keys or you are going to fuckin' die today." Manuel believed the keys were in the back office, so Albert put his gun against Manuel's back and accompanied him there. At the entrance to the office, Albert noticed a surveillance camera, stepped back, and pulled a nylon stocking over his head.

While Manuel and Albert were in the back, Elisa told Elizabeth that she looked "really familiar" and that Elisa "knew" her. Elizabeth replied, "Shut the fuck up. Put your head down or else you are going to die today." At gunpoint, Elizabeth ordered Elisa and Arturo to get down on their knees.

In the meantime, Manuel retrieved the keys to the display cases and returned to the front of the store. Albert pointed to jewelry display cases he wanted Manuel to open, and as Manuel was complying, a second unidentified male robber came into the store and began breaking other jewelry cases with a hammer. The three robbers took more than 20 pieces of jewelry and then drove away in a white four-door Honda. Police later found the car, which had been reported stolen two days earlier, abandoned nearby.

The robbery was recorded by the store's surveillance video cameras, but the video did not provide any leads to the identity of the robbers. The witnesses' descriptions of the robbers did not result in any leads either. The police conducted fingerprint and DNA testing on the recovered white Honda and at the jewelry store, but the tests also failed to yield any suspects. The case went "cold" for two years.

B. Gold n' Pawn Robbery

About two months after the Oasis Jewelry robbery, on September 2, 2009, Albert, Elizabeth, and a second man, later identified as Emmanuel Barrales,[2] robbed the Gold n'

[2] Barrales is not a defendant in this case.

Pawn pawnshop in Norwalk. Albert and Elizabeth entered the store first, at about 10:00 a.m. Albert was holding a handgun and he walked up to an employee, Donald Rodriguez, who was sitting behind a counter. Surveillance video from the incident also shows Elizabeth removing a handgun from a blue tote bag as she reached the counter with her brother.

The owner, Elliott Wainer, was in his office and observed defendants' actions through a one-way mirror. He was afraid, and retrieved a revolver that he kept in the office.

Three additional employees, Veronica Ramos, her daughter Vanessa Davalos, and Erik Carrillo, were in a back area of the store and also saw Albert and Elizabeth through a one-way mirror. Although the employees remained in the back, Albert brought Rodriguez to that area and told all four employees to get down on the floor and not to look at him. Rodriguez could still see the front of the store, where he observed Elizabeth walking around the showcases; he also saw she had been joined by Barrales.

Albert told Davalos to get up and give him the keys to the jewelry showcases and the money from the cash drawer. Ramos got up instead, because she was the only one who knew where the money was kept. Ramos, at gunpoint, went to the front of the store with Albert and opened the jewelry showcases and the cash register. After she gave Albert the money from the register, he told her to get the rest of the money. Ramos walked toward Wainer's office, followed by Albert. Before Ramos and Albert reached the office, Wainer activated a silent distress device and moved next to a file cabinet to hide.

Ramos entered the small office, and Albert pushed her toward the desk. Ramos bent over to open the bottom drawer where Wainer kept his money. As she did, she realized that she could see Wainer and Albert's reflections in the one-way mirror. Wainer, who was standing to defendant's left with Ramos bending over between the two men, pointed his gun inches from Albert's head; Wainer would later characterize Albert's reaction at trial as getting "spooked." Albert turned his gun in the direction of Ramos and Wainer, and fired a shot. Wainer then fired his gun, and Albert continued to shoot as

he backed out of the office. During the exchange of gunfire, which lasted only seconds, Albert shot Ramos, and she collapsed onto the floor. Albert also shot Wainer multiple times during the gun battle. Albert escaped unscathed.

When Davalos and Rodriguez heard gunshots coming from Wainer's office, they ran to the back of the store and hid in a small closet. Carrillo went to Wainer's office, retrieved his handgun, and went to the front of the store as the robbers drove away. He attempted to fire the handgun, discovered it was empty, grabbed a different gun from the cash register, and fired a bullet through the windshield of the getaway car.

Wainer and Ramos were taken to a hospital, both with severe injuries. Ramos lost two-thirds of her blood and required transfusions. She underwent lung surgery because her lung had collapsed, and she also had two operations on her back. She is paralyzed and confined to a wheelchair as the result of the gunshot wound she suffered, and at the time of trial she required a home caregiver for 70 hours a week. Wainer suffered four gunshots wounds: in his right arm, left calf, right thigh and abdomen. Wainer underwent surgery, but bullet fragments remained in his groin and a bullet remained in his back, very close to his spine. At the time of trial, he suffered ongoing problems with his intestines, arms, and legs.

C. Police Investigation of the Pawnshop Robbery and Additional Investigation Identifying Defendants as the Culprits of the Prior Jewelry Store Robbery

Los Angeles County Sheriff's deputies responded to the robbery and shooting at the Gold n' Pawn, and Rodriguez told the deputies the robbers had driven an older black Acura with white spots on the hood. Less than an hour after the robbery, one of the deputies found a stolen 1992 black Honda Accord with a bullet hole in its windshield less than a mile from the pawnshop. Los Angeles County Sheriff's Department Sergeant Espeleta, the lead investigating officer, found a watch on the floorboard of the car that Wainer identified as belonging to the pawnshop. No usable fingerprints were found on the car. Criminalist Cindy Carroll swabbed the car for DNA, but defendants were not possible contributors to any tested DNA. Barrales, however, was a major contributor to

DNA swabbed from the gearshift. He was also a possible contributor to a mixture of DNA swabbed from the steering wheel.

At the pawnshop, Carroll swabbed a pair of gloves and a hammer. The gloves contained a DNA mixture; Elizabeth was the major contributor to the DNA on one glove and a possible contributor to the DNA on the other glove. Elizabeth and Barrales were possible contributors to the DNA mixture on the hammer. Carroll did not identify Albert as a possible contributor to any of these items. No usable fingerprints were found at the pawnshop.

Sergeant Espeleta noticed a blue vinyl bag on Wainer's desk. Inside the bag, the sergeant discovered a traffic citation for Elizabeth, with an address in the 4000 block of Princeton Street. Sergeant Espeleta learned that Albert lived at that same address. Sergeant Espeleta created six-pack photographic line-ups containing defendants' photographs and showed them to the pawnshop employees. Davalos identified Albert, writing that she was "pretty sure" of her identification. None of the other employees identified anyone in the photographic line-ups (Rodriguez selected someone other than Albert and said, "not sure it might be him").[3]

Based on the evidence uncovered during the investigation, Sergeant Espeleta executed search warrants at multiple locations associated with Albert. Albert drove up during the search of one of the locations. Sergeant Espeleta searched him incident to arrest and discovered a business card from a storage business; the card bore the notations "A262" and "A298." The sergeant also found a key to storage unit A298.

Sergeant Espeleta obtained an additional warrant to search the storage units listed on the business card found in defendant's possession. According to the storage facility manager, Albert rented the two units on October 29, 2009 (a date after both the Oasis Jewelry and Gold n' Pawn robberies), and a young Hispanic woman was with him when he rented the units that day. When officers searched unit A298, they recovered

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[3] At trial, Davalos, Carrillo, and Rodriguez identified Albert as one of the robbers. When asked, Davalos and Rodriguez could not make an in-trial identification of Elizabeth as one of the robbers.

approximately 40 pieces of jewelry hidden inside a locked tool chest, $30,598 in cash, and paperwork bearing Albert's name. Wainer identified 16 of the recovered pieces as belonging to the pawnshop. Davalos, Carrillo and Rodriguez also identified jewelry items taken from the pawnshop.

Much later, in August 2011 and after defendants had already been charged in connection with the Gold n' Pawn robbery, Whittier Police Officer David Yoshitake, the lead investigating officer for the Oasis Jewelry robbery, was at the District Attorney's office in Norwalk. He noticed two prosecutors reviewing video footage of the Gold n' Pawn robbery and saw it was a "take over" robbery by two men and one woman, executed in a similar manner to the Oasis Jewelry robbery.

Officer Yoshitake contacted Sergeant Espeleta, learned the name of the three suspects in the pawnshop robbery, and created six-pack photographic line-ups using photographs of the suspects. All four victims of the Oasis Jewelry robbery identified Albert. No one identified Elizabeth in the six-packs (Elisa and Manuel selected a woman other than Elizabeth as the female robber).[4] At trial, Manuel viewed a photograph of the blue bag left behind by defendants in the pawnshop robbery, admitted as People's Exhibit 19, and stated that it was the same purse the female robber was carrying when she entered Oasis Jewelry on July 13.

Law enforcement officers also showed the jewelry they recovered during their search of Albert's storage unit to two employees of the Oasis Jewelry store, Elisa and Manuel. They identified some of the recovered jewelry as items that were taken during the Oasis Jewelry robbery, including a custom piece designed by Manuel.

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[4] At trial, Elisa and Manuel identified defendants as the perpetrators of the Oasis Jewelry robbery. Arturo also made an in-court identification of Albert, but he could not say with certainty that Elizabeth was the woman involved in the robbery because "she told us not to look at her because if we were to keep looking at her, she was going to kill us." Reyes Juarez Lopez, the fourth victim at Oasis Jewelry, identified Albert during trial but stated he did not recall Elizabeth being present during the robbery.

D. Albert's Defense at Trial[5]

Albert testified in his own defense at trial. He told the jury that on July 13, 2009, the date of the Oasis Jewelry robbery, he was installing a gate at a residence in Orange County. Albert testified that in the morning on September 2, 2009, the date of the Gold n' Pawn robbery, he was in a welding class at Cerritos College. He also said he had tattoos on his hand, neck, and head in July and September 2009.

Albert further testified the first male robber in the pawnshop robbery surveillance video was not him but a man named "Jose," and he identified Elizabeth as the female robber. He was "not exactly sure" who the second male robber was. As for the Oasis Jewelry robbery, Albert testified that the second male robber "seems to be the person" in the pawnshop video. He could not tell who the female robber was.

Albert also offered an explanation for the jewelry found during the search of his storage unit. He claimed he purchased stolen property, including jewelry, and stored the property in his rented storage units. He said bought stolen items twice from the man named Jose.

In addition to testifying himself, Albert also called a DNA expert, Blaine Kern, as a witness. Kern tested some previously untested DNA swabs from the suspected getaway car in the Oasis Jewelry robbery. Albert was excluded as a potential contributor to those DNA samples. Elizabeth and Barrales were possible contributors to DNA from a screwdriver from the car. Elizabeth and Barrales were also possible contributors to DNA found on the car's gearshift.

Albert also called Mitchell Eisen, an eyewitness identification expert, as a witness. He explained that he was not testifying "to offer any opinion whatsoever about whether any of the witnesses in th[e] case were right or wrong in any identification they made"; rather, he would discuss the limits of human memory and the different ways in which external stimuli and other factors can influence a person's memory and ability to identify the perpetrator of a crime. He offered opinions on various concepts and "effects" that can

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[5] Elizabeth rested her case without presenting evidence.

lead witnesses to make incorrect identifications, including in six-pack photographic lineups.

Cynthia Scott, who worked for a tattoo removal business, also testified for Albert. She performed tattoo removal treatments on Albert's head and finger tattoos after the robberies. The defense used her testimony to argue Albert's tattoos would have been more prominent, and therefore more noticeable, at the time of the robberies than they were at the time of trial.

Albert's mother and his girlfriend also testified on his behalf. His mother testified that she had given Albert about $36,000 in 2008, which represented a lump sum retirement payment she received. Albert testified, and the defense argued, this gift explained the cash the police found in his storage unit. Albert's girlfriend Fabiola Juarequi testified that in the fall of 2009, she and Albert had lunch together at their apartment every weekday between 12:00 p.m. and 1:00 p.m., after he was finished with his welding class that took place in the morning. On September 2, 2009, the date of the pawnshop robbery, she did not notice anything unusual about Albert during their lunch.

Rupert Pacheco, a welding instructor at Cerritos College, testified that in the fall of 2009, Albert attended Pacheco's class from 7 a.m. to 11 a.m. Pacheco's attendance sheet showed that Albert was not absent on September 2, 2009. On cross-examination, Pacheco admitted that class attendance records also showed that Albert was present in class between November 18 and December 16 even though Albert was necessarily absent on those days—he was arrested on November 19, 2009, and remained in jail thereafter.

The prosecution called Sergeant Espeleta to testify in rebuttal. He testified that he interviewed Juarequi in November 2009, and she told him that she did not know what Albert did after he was finished with school in the morning.

E. Jury Verdicts and the Bifurcated Court Trial on Gang Allegations

The jury convicted Elizabeth and Albert of five counts of second degree robbery (Penal Code[6] section 211) and two counts of attempted murder (sections 187 and 664) for the pawnshop incident, and four counts of robbery for the Oasis Jewelry incident. The jury also convicted Albert on one count of being a felon in possession of a handgun in violation of section 12021, subdivision (a)(1). The jury found true a variety of firearm enhancements, notably, seven allegations that a principal discharged a firearm causing great bodily injury in the commission of the pawnshop crimes, within the meaning of section 12022.53, subdivision (d).[7]

After taking the jury verdicts and discharging the jury, the court held a bifurcated trial on the gang allegations. It was undisputed that Albert had been a member of the Little Valley gang, but Albert claimed that he was not active in 2009. Elizabeth denied being a member of the gang at all.

Sergeant Espeleta testified that when he questioned Elizabeth in December 2009 about the Gold n' Pawn robbery, she told him that she committed the robbery with Little Valley gang member "Solo" and with Albert. Elizabeth's statements were admitted only against her.

Sergeant Espeleta also testified he uncovered evidence of Barrales' membership in the Little Valley gang during a search of Barrales' bedroom in November 2010. The evidence indicated that his gang nickname was "Solo."

Gang expert Gina Eguia opined that Albert and Barrales were active members of the Little Valley gang. She also opined that Elizabeth was a Little Valley gang member at the time of the robberies. Her opinion was based on the fact that Elizabeth lived in Little Valley gang territory, the father of her children was a Little Valley gang member,

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[6] All undesignated statutory references that follow are to the Penal Code.

[7] Albert admitted that he had suffered a prior felony conviction within the meaning of the Three Strikes Law (§§ 667, subds. (b)-(i), & 1170.12) and had served two prior prison terms within the meaning of section 667.5.

and she has "partied" or "hung out" with Little Valley gang members. The trial court rejected Eguia's opinion as insufficient to establish Elizabeth was a member of the Little Valley gang at the time of the robberies.

The trial court found true the section 186.22, subdivision (b) gang enhancement allegations only as to Elizabeth, based in part on her admission that Barrales ("Solo") was a gang member and she committed the pawnshop robbery with him. This resulted in a true finding on the section 12022.53, subdivisions (d) and (e)(1) firearm allegations as to Elizabeth.[8] The court did find Albert to be a gang member at the time of the offenses, but the court found the gang allegations not true as to Albert because there was no evidence admissible against him showing the other robbers were gang members at the time of the robberies. (Elizabeth's admission concerning Barrales was not admitted against Albert.)

F. Sentencing

The trial court sentenced Albert to a total determinate term of 61 years, 8 months in state prison for the robbery and attempted murder convictions with applicable enhancements, plus seven consecutive terms of 25 years to life for the section 12022.53, subdivision (d) firearm discharge enhancements for the robbery counts involving the Gold n' Pawn. The court imposed various fines and fees, including a $20,000 restitution fine pursuant to section 1202.4, subdivision (b) and a $300 parole restitution fine pursuant to section 1202.45, stayed.

The trial court sentenced Elizabeth to a determinate term of 57 years, 8 months in state prison for the robbery and attempted murder convictions with applicable

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[8] The court initially stated that it could not find true the gang enhancements for the Oasis Jewelry robbery because the evidence did not prove who the second male robber was. Elizabeth had admitted that she committed the pawnshop robbery with Solo (i.e., Barrales), but made no admissions concerning the Oasis Jewelry robbery. The prosecutor stated that the "in association with" requirement could be met with only one gang member. The court replied, "Oh, so you are saying her brother is enough." The prosecutor agreed, and the court stated "Okay. Under that analysis, we didn't talk about [that] because that wasn't an issue insofar. I find the allegation true as to all counts . . . [¶] as to Ms. Elizabeth Chavez only."

enhancements, plus seven consecutive terms of 25 years to life for the section 12022.53 firearm discharge enhancements for the robbery counts involving the Gold n' Pawn. (§ 12022.53, subds. (d), (e)(1).) The court imposed various fines and fees, including a $20,000 restitution fine pursuant to section 1202.4, subdivision (b) and a $300 parole restitution fine pursuant to section 1202.45, stayed.

II. DISCUSSION

Albert contends there is insufficient evidence that he was the perpetrator of any of the crimes, or if there is sufficient evidence that he was a perpetrator, there is insufficient evidence that he intentionally discharged his firearm toward Ramos or had the specific intent required to be guilty of her attempted murder. He further contends the trial court erred in instructing the jury on the "kill zone" theory of liability for attempted murder. He also argues the trial court erred in imposing consecutive sentences for both the robbery and attempted murder of Wainer and Ramos, and he asserts his sentence constitutes cruel and unusual punishment. Last, he asks us to correct the section 1202.4 restitution and section 1202.45 parole revocation fines the trial court imposed in unauthorized amounts.

Elizabeth contends there is insufficient evidence to support defendants' convictions for the attempted murder of Ramos or to show that Albert intentionally discharged his firearm, as well as insufficient evidence to support the trial court's true finding on the gang enhancement allegations. She asks us to construe section 12022.53, subdivisions (d) and (e)(1) to preclude what she terms a "de facto" life without the possibility of parole (LWOP) sentence on a defendant like her whose liability is vicarious. She further contends section 12022.53, subdivisions (d) and (e)(1) violate her right to equal protection and her right to be free from cruel and unusual punishment. Elizabeth and Albert join each other's contentions.

We hold the eyewitness identifications, video surveillance footage, and jewelry recovered during execution of the search warrant are sufficient evidence to support Albert's convictions. We also hold sufficient evidence supports the finding that

Elizabeth committed the pawnshop robbery—but not the jewelry store robbery—in association with a criminal street gang. Although the trial court found Elizabeth was not a gang member herself, there is enough evidence to support a finding that her commission of the pawnshop crimes with Albert and gang member Barrales was gang related; her commission of the Oasis Jewelry crimes with only her brother and another unidentified man, however, is insufficient to establish the culprits "came together *as gang members*" to commit the offense. (*People v. Albillar* (2010) 51 Cal.4th 47, 62 (*Albillar*) (emphasis in original). We reject defendants' contention they are entitled to reversal for misinstruction on the kill zone theory. We also determine there is no basis to construe section 12022.53 in the manner defendants suggest. We therefore affirm all convictions, affirm Albert's sentence with corrections, and remand for resentencing of Elizabeth.

A. Sufficiency of the Evidence to Support Albert's Convictions

"In addressing a challenge to the sufficiency of the evidence supporting a conviction, the reviewing court must examine the whole record in the light most favorable to the judgment to determine whether it discloses substantial evidence—evidence that is reasonable, credible and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. (*People v. Johnson* (1980) 26 Cal.3d 557, 578.) The appellate court presumes in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence. (*People v. Reilly* (1970) 3 Cal.3d 421, 425; accord, *People v. Pensinger* (1991) 52 Cal.3d 1210, 1237.) The same standard applies when the conviction rests primarily on circumstantial evidence. (*People v. Perez* (1992) 2 Cal.4th 1117, 1124.) Although it is the jury's duty to acquit a defendant if it finds the circumstantial evidence susceptible of two reasonable interpretations, one of which suggests guilt and the other innocence, it is the jury, not the appellate court that must be convinced of the defendant's guilt beyond a reasonable doubt. (*Ibid.*) "'"If the circumstances reasonably justify the trier of fact's findings, the opinion of the reviewing court that the circumstances might also reasonably be reconciled with a contrary finding does not warrant a reversal of the judgment. [Citation.]"'

(*People v. Thomas* (1992) 2 Cal.4th 489, 514.)" (*People v. Kraft* (2000) 23 Cal.4th 978, 1053-1054.)

Albert claims the eyewitness identifications were flawed and cannot suffice to support the jury's finding that he participated in the charged robberies. He emphasizes there was no forensic evidence linking him to the crime scenes. We, however, conclude the evidence of identity, including the jewelry from both robberies found in Albert's storage unit, is substantial and therefore sufficient to support the jury's verdicts.

1. Evidence of Albert's participation in the robbery of the pawnshop victims

The victim witnesses at the Gold n' Pawn gave a reasonably accurate general description of Albert, who is about five feet nine inches tall, had a mustache, and was 29 to 30 years old at the time of the crimes. Rodriguez described him as early to mid-thirties, 5'9" to 5'10" tall, weighing about 200 pounds with a mustache. Carrillo described him as late twenties to mid-thirties, 5'10' to 6' tall, weighing about 200 pounds with a shaved head and a mustache. Davalos described him as mid-thirties, 5'9" to 5'10" tall, with a mustache. Wainer described him as mid-twenties, 5'7' to 5'9' tall.

One of the pawnshop witnesses, Davalos, picked Albert out of a six-pack photographic line-up and said she was "pretty sure" he was one of the robbers. Albert contends Davalos picked him just based on his mustache, but she denied doing so. We have reviewed the line-up viewed by Davalos, and all the men have mustaches; five of the men, including Albert have a wide thick mustache. Nothing about Albert's mustache makes him stand out. We also note Davalos was the only employee to pick out Albert from the photographic line-up, and this indicates the line-up was not suggestive. (See *People v. Dolliver* (1986) 181 Cal.App.3d 49, 56-57 ["[A] photo procedure in which a victim picked someone other than appellant could not possibly be construed as singling out appellant in an unreasonably suggestive way."].)

In addition, Davalos, Carrillo, and Rodriguez identified Albert at the preliminary hearing and at trial. All three had ample opportunity to observe Albert as he moved

around the store during the robbery. Davalos was in the back room when the robbers entered and so had a good opportunity to observe the robbers through the one-way mirror before being confronted by Albert. Rodriguez was in the front of the store and noticed Albert and his companions when they got out of the car in the parking lot. Albert entered alone, and "all" of Rodriguez's attention was drawn to him. Carrillo was the in the back of the store when Albert entered, and had an opportunity to see him through the one-way mirror. When Albert came into the back room, he directed Carrillo to get down on the floor, but Carrillo kept looking up at Albert. Carrillo's attention was directed to Albert's face.

Although a first identification by a witness at a preliminary hearing or trial may not be as strong as one from a line-up, it is still an identification that the jury may weigh as evidence of guilt and that a reviewing court may consider, under the applicable standard of review, as substantial evidence in support of the jury's verdict. (*People v. Elliott* (2012) 53 Cal.4th 535, 585-586 [in-court identifications were sufficient evidence to establish guilt despite inconsistencies in initial eyewitness descriptions and claim that testimony was tainted by suggestive photo arrays]; see *In re Gustavo M.* (1989) 214 Cal.App.3d 1485, 1497 ["[W]hen the circumstances surrounding the identification and its weight are explored at length at trial, [and] where eyewitness identification is believed by the trier of fact, that determination is binding on the reviewing court"].)[9] It is not improbable that a witness would recognize a perpetrator in person but not in a photograph. (See *In re Gustavo M.*, *supra*, at p. 1497 [victim not positive when looking at photographs but was positive "when she saw appellant in the flesh"].)

The witnesses' identifications were strengthened by the surveillance video from the robbery. That video was played for the jury, which could make its own determination of the resemblance between Albert and the first male robber.

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[9] Here, the circumstances surrounding the identifications were explored at length during trial, including by the defense in presenting the testimony of eyewitness identification expert Eisen.

Albert points out, however, that the prosecutor told jurors "[y]ou will drive yourself mad trying to determine if beyond a reasonable doubt the person in the videotape is or is not Albert Chavez."[10] We do not understand the comment to mean that the quality of the video precluded the jury from identifying who was depicted; indeed, Albert said he was able to identify Elizabeth and "Jose" in the pawnshop video footage. Even if the relevant portion of the video were not long enough in duration to prove Albert's identity beyond a reasonable doubt on its own, which we take to be the prosecutor's point, it does provide glimpses of a man who strongly resembles Albert, and the jury was entitled to consider that resemblance in evaluating the witnesses' identifications.

Albert also argues the pawnshop identifications are unreliable because Wainer said in his preliminary hearing testimony that one of his gunshots hit the male robber in the shoulder, but there was no evidence that Albert had been shot in that location. Wainer recanted that testimony at trial, explaining instead that he did not know if he shot the male robber and that he did not see the male suspect bleed at any point after shooting at him. The jury was not required to accept Wainer's preliminary hearing testimony as true. The shooting was captured by surveillance video and does not clearly show the male robber being shot. There was also no evidence of blood in the getaway car, which further indicates that Wainer was simply initially mistaken about shooting the male robber.

We have yet to mention what is perhaps the most damning evidence of identity: the loot found in Albert's storage unit. Police found jewelry stolen from Gold n' Pawn (and Oasis Jewelry) in that unit, and Albert acknowledged both possessing the jewelry and knowing it was stolen. As the jury was instructed, conscious possession of recently stolen property together with slight corroborating evidence may support an inference of guilt of robbery. (See *People v. Seumanu* (2015) 61 Cal.4th 1293, 1350-1351.) Corroborating evidence can include a false account of how the defendant acquired

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[10] Albert quotes the court as stating that "there's no way you could identify anybody off the videos. All the videos really show are some people who are indistinguishable." In context, the court is referring to the surveillance video from the Oasis Jewelry robbery. We have reviewed the Oasis Jewelry video and find it both shorter and of lower quality than the pawnshop video.

possession of the stolen goods. (*People v. Gamble* (1994) 22 Cal.App.4th 446, 453-454; *People v. Anderson* (1989) 210 Cal.App.3d 414, 423-424.) Here, the jury was certainly entitled to find false Albert's story about how he acquired the stolen jewelry, namely that he got it from the man named Jose who he claimed was depicted in the pawnshop surveillance video with his sister Elizabeth. The witnesses' descriptions of the first male robber and identification of Albert as that robber provide additional corroborating evidence. Albert's possession of recently stolen property plus the above-described corroborating evidence is substantial evidence supporting Albert's convictions for robbery.

2. Evidence of Albert's participation in the robbery of the Oasis Jewelry victims

As was the case with the pawnshop witnesses, the Oasis Jewelry witnesses gave reasonably accurate descriptions of Albert. Elisa described the first male robber to police as Hispanic with big ears, a shaved head, and a thick mustache. Manuel described the first male robber as having a bald head and a "predominant" mustache. Surveillance video shows the first male robber entering the store bareheaded, but later shows him with a stocking pulled over his head.

Although the Oasis Jewelry employees were not shown a six-pack photographic line-up containing Albert's photo until two years after the robbery, all four employees selected Albert from that six-pack photographic line-up. They also identified Albert at trial.

Albert contends the witnesses' identifications are flawed because his was the only photograph in the six-pack of a male with a thick mustache. We have reviewed the photographic array shown to the Oasis Jewelry witnesses and Albert is the only man with a thick mustache. All the other men had much thinner or no mustaches.

Generally, "[m]inor differences in facial hair among [] participants [do] not make the lineup suggestive." (*People v. Johnson* (1992) 3 Cal.4th 1183, 1217.) Apart from mustache thickness, the men in the photos have quite similar appearances. Their eyes are

a similar shape and color, their skin tone is similar, the shape of their faces is similar, they have either very short hair or shaved heads, and they all have "big ears" which stick out from their heads.

Having said that, we acknowledge there is a noticeable difference between Albert's mustache and those of the other "filler" suspects in the photo lineup. But even if the photograph of Albert has a suggestive element, that fact alone does not render the witnesses' identification unreliable. (*People v. Elliott, supra*, 53 Cal.4th at p. 585 ["Inconsistencies in [witnesses] descriptions of the perpetrator and any suggestiveness in the lineups or photo arrays they were shown are matters affecting the witnesses' credibility, which is for the jury to resolve"].) The question is whether the identifications themselves were "reliable under the totality of the circumstances, taking into account such factors as the opportunity of [each] witness to view the suspect at the time of the offense, the witness's degree of attention at the time of the offense, the accuracy of his or her prior description of the suspect, the level of certainty demonstrated at the time of the identification, and the lapse of time between the offense and the identification." (*People v. Cunningham* (2001) 25 Cal.4th 926, 989.)

Here, two of the four employees, Manuel and Elisa, had an extended opportunity to view Albert and there is no reason to believe that they relied only on Albert's mustache in making an identification. Manuel and Elisa were in the back of the store when Albert entered, and could view Albert through the one-way mirror before they encountered him. When Albert entered the store on the day of the robbery, Elisa immediately recognized him from a prior visit. Thus, she had an opportunity to view him on two occasions. Manuel was very confident of his identification. Manuel spent the most time inside the store with Albert, walking up to Albert in the front of the store, back to the office with him, and back again to the front. Manuel said he tried to make as much eye contact with Albert as he could during this time. A reasonable jury could have found these two identifications reliable under the totality of the circumstances, and these identifications are substantial evidence which supports Albert's convictions on the Oasis Jewelry charges.

To the extent Albert argues the witnesses' identifications were unreliable because they occurred after the witnesses had watched the surveillance video multiple times, there was universal agreement in the trial court that the video footage from the Oasis Jewelry robbery was of poor quality. After viewing the Oasis Jewelry video footage ourselves, we agree, and we conclude there is therefore no basis to believe the witnesses' identification should be held unreliable because they repeatedly viewed the video.

In addition to the witness identifications, the jewelry recovered in Albert's storage locker provides a strong, corroborative factual basis for the jury's Oasis Jewelry robbery verdicts just as it does for the pawnshop verdicts. Items from both locations were found in the storage unit, including a custom-made piece designed by Manuel, and the recovery of the jewelry reinforces the sufficiency of the evidence against Albert for same reasons we have already discussed in connection with the pawnshop robbery.

3. Tattoos

Notwithstanding the evidence we have reviewed, Albert argues the evidence must be held insufficient because none of the witnesses in either incident identified what Albert believes are his prominent tattoos. Albert's booking photo and other photos of him admitted into evidence at trial depict tattoos that he had on the back and side of his head, the side of his neck, and the ring finger of his left hand.

The jury was shown numerous photographs of Albert. We have reviewed those photos. The head tattoos are not appreciably noticeable from the front. There is the suggestion of a line on the right side of Albert's head, but it is scarcely visible. A booking photograph taken in November 2009, admitted at trial as People's Exhibit 30, shows the tattoos on the back of Albert's head to be faint in appearance, and the markings are further obscured by stubble on Albert's head.[11] Similarly, a photo offered by the

[11] Albert offered evidence at trial that he had started tattoo removal in October 2009 for work-related purposes. At most, he had two sessions. According to the tattoo removal witness who testified at trial, complete tattoo removal takes about a year. Thus, the jury could reasonably have found that the prominence, or lack thereof, of the tattoos

defense as Exhibit RR shows the tattoo markings on the side of Albert's head to be sparse and to blend in with hair stubble. The photographs depict a fairly small tattoo on the left side of Albert's neck, but it is not distinctive or prominent. The tattoo on Albert's hand is on the ring finger of his left hand, which was not the hand Albert used to hold the gun during the robberies.

Under these circumstances, the witnesses' failure to notice the tattoos does not make their identifications insufficient as a matter of law. The jury viewed all of the above mentioned photographs and the surveillance videos from the robberies, and the jury also saw Albert in person during the trial. The defense repeatedly argued in closing that the witnesses were unreliable because they did not notice the tattoos, and the trial court instructed the jurors using CALJIC 2.92 on the factors they should consider in determining the believability of an eyewitness identification. It was their task to determine what weight, if any, to give to the witnesses' failure to notice Albert's tattoos, and we see nothing in the record that gives us pause in upholding the jury's determination of guilt as sufficiently supported by the evidence.

B. Sufficiency of the Evidence to Support the Gang Enhancements

The People alleged that Elizabeth committed the robberies and attempted murders for the benefit of a criminal street gang within the meaning of section 186.22, subdivision (b)(1)(A). That subdivision provides an enhanced term for crimes "committed for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members."

The trial court heard evidence that Elizabeth admitted committing the pawnshop robbery with Albert and a man known as "Solo" (Barrales) who was a member of the

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at the time of arrest and trial was comparable to how they appeared at the time of the robberies.

Little Valley gang.[12] There was also evidence that Albert was a Little Valley gang member. The trial court rejected the gang expert's opinion as insufficient to establish Elizabeth was a gang member.

Elizabeth, however, did not make any admissions about the Oasis Jewelry robbery, and the identity of the second male robber was not determined during the bifurcated bench trial. The trial court initially indicated it would find the gang allegation not true for the Oasis Jewelry robbery because the identity of the second male robber was unknown. The prosecutor agreed that there was no such evidence, but argued that only one gang member was needed for the enhancement to apply. The court then found the gang allegations true for the Oasis Jewelry robbery, on the ground that "her brother is enough." Specifically, the trial court found true the allegations that Elizabeth committed the crimes "in association with" the Little Valley gang and with the intent to promote, further, or assist in any criminal conduct by gang members.[13]

Elizabeth contends the trial court misunderstood the "association" requirement and she argues there is no evidence to support a finding that she committed the crimes in "association with" a gang as that requirement is properly understood.

During oral argument at the conclusion of the court trial on the gang allegations, the trial court stated "I think that we have here clearly evidence that it was committed in association with a gang member." Elizabeth's trial counsel argued at length that the statute referred to a gang, not gang members, and that "in association with" a gang did not have the same meaning as association with gang members. Elizabeth urges the same point on appeal. She maintains that more is required to sustain a gang enhancement than mere proof that a defendant has aided and abetted a known gang member to commit any crime. She asserts the enhancement requires proof that the "defendants relied on their

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[12] On the other hand, there was no evidence *admissible as to Albert* that Elizabeth or Barrales were gang members, and the trial court therefore found the gang enhancements not true as to Albert.

[13] The court specifically found that there was no evidence that Elizabeth committed the robberies "for the benefit of" or "at the direction of" a gang.

common gang membership and the apparatus of the gang" to commit crimes. (*Albillar*, *supra*, 51 Cal.4th 47, 60.)

The statement Elizabeth cites in *Albillar* was made in the context of the court's observation that the record supported a finding the "defendants relied on their common gang membership and the apparatus of the gang" to commit the charged crimes; the court did not require such a finding. (*Albillar*, *supra*, 51 Cal.4th at p. 60.) Instead, the court held there was "substantial evidence that defendants came together *as gang members* to attack [the victim] and, thus, that they committed these crimes in association with the gang." (*Id*. at. p. 62 [italics in original].) *Albillar* does not require proof of any specific set of facts; it requires proof that the crimes are "gang related" as opposed to personal or attributable to some other non-gang-related nexus.[14] (*Id*. at p. 60.)

Here, there is substantial evidence that the pawnshop crimes alleged in counts 1 through 7 were gang-related. While defendants are siblings, and so connected to each other by family ties, the only connection between defendants and Barrales shown by the record is gang membership. Barrales and Albert were gang members, and Elizabeth lived in gang territory and socialized with gang members. Indeed, Elizabeth only knew Barrales by his gang name of "Solo"; she thought his first name might be Jose, but it was not. Although their only common tie was the gang, the three relied on each other to carry out the complicated and well-planned pawnshop robbery, which involved the use of a car stolen a day or two before the robbery and the division of the stolen goods after the robbery. These circumstances support a rational inference that the three came together around their common ties to the Little Valley gang and that the pawnshop crimes were gang-related.

The same rationale does not hold with respect to the Oasis Jewelry robbery. Both the prosecution and the court agreed that there was insufficient evidence to establish the

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[14] As the court explained, "the Legislature included the requirement that the crime to be enhanced be committed for the benefit of, at the direction of, or in association with a criminal street gang to make it 'clear that a criminal offense is subject to increased punishment . . . only if the crime is 'gang related.'" (*People v. Gardeley* (1996) 14 Cal.4th 605, 622.)" (*Ibid*.)

identity of the second male robber in that robbery. The prosecution's examination of its gang expert proceeded on the understanding the identity of the second male robber was unknown, and the expert opined Elizabeth committed the Oasis Jewelry robbery in association with the Little Valley gang solely because she committed the crime with her brother who was a gang member. In addition, once the presentation of evidence at the court trial was complete, the court asked, "[W]e don't have any evidence that the other person was present at the other robbery; do we?" The prosecution agreed, "We don't." The court continued, "So I think it's just the Golden Pond [sic] charges. Because we don't know who that person—I can't assume it's the other person it seems to me."[15]

Because there was insufficient evidence of the second male robber's identity, there was no evidence that man was a gang member. The trial court found gang expert Eguia's testimony insufficient to establish Elizabeth herself was a gang member. Thus, the only evidence before the trial court regarding whether the Oasis Jewelry robbery was "gang related" was Elizabeth's commission of the crime with Albert, her brother. Without more, the fact that Elizabeth committed the crime with her gang member brother and an unidentified third person is insufficient to support a true finding on the gang allegation. And there were no additional relevant facts, for example, common gang membership between Elizabeth and Albert (cf. *Albillar*, 51 Cal.4th at pp.61-62) or commission of the crime in Little Valley gang territory (cf. *People v. Livingston* (2012) 53 Cal.4th 1145, 1171-1172), to prove that Elizabeth and Albert—along with a second unidentified man—

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[15] At oral argument, counsel for Elizabeth acknowledged the trial court considered the evidence presented during the jury trial for purposes of the bifurcated trial on the gang allegations. Thus, the trial court's finding the evidence was insufficient to establish the identity of the third Oasis Jewelry robber necessarily includes its consideration of all the evidence presented during the jury trial, including the inconclusive DNA evidence presented in the defense case. Indeed, comments made by the trial court during the bifurcated proceedings contrasted the evidence of the participants in the pawnshop robbery with the dearth of evidence concerning "who the third person is" in the Oasis Jewelry robbery: "I'm not even considering the Whittier case. I'm considering strictly the Norwalk case because there the evidence to me is very strong and unequivocal about who the participants were. . . . [W]e don't have any doubt about who the three people are in the Norwalk case."

came together *as gang members*, rather than as family members or by virtue of some other personal bond, to commit the crime. We therefore reverse the true finding on the section 186.22 allegations in connection with the Oasis Jewelry counts of conviction as insufficiently supported by the evidence, and we remand for resentencing.[16]

C. Sufficiency of the Evidence to Show Intentional Firearm Discharge

Section 12022.53, subdivision (d) applies to any person who "personally and intentionally discharges a firearm and proximately causes great bodily injury. . . ." Albert and Elizabeth contend there is insufficient evidence the first discharge of Albert's weapon, which defendants believe was the shot that struck Ramos, was intentional. They therefore urge us to hold insufficient evidence supports the jury's true finding on the section 12022.53, subdivision (d) allegation.

Defendants point to Wainer's testimony that he believed Albert "got spooked" as evidence that Albert discharged his firearm accidentally rather than intentionally. Specifically, Wainer testified that "[w]hen [Ramos] was leaning over to pull out the bulk [cash from the desk], I believe [Albert] got spooked and a fire went off, a shot went off." Albert also relies on Ramos's testimony that she could see a reflection of Wainer in a one-way window when she bent down to open the desk drawer and her description of the events as occurring "very fast"—theorizing that Albert also saw the reflection and got startled into firing his gun.

Wainer's reference to the shooter having gotten "spooked" is insufficient to warrant reversal. That term can be understood to mean Albert simply became alarmed, but not startled in a way that caused him to immediately and reflexively fire a shot without intending to do so. Indeed, not only *can* "spooked" be so understood, we believe

[16] Our conclusion does not disturb the jury's true findings on the firearm enhancement allegations alleged in counts 9 through 12. Those findings are supported by ample evidence of Elizabeth's own use of a firearm in the Oasis Jewelry heist and are not dependent on liability under section 12022.53, subdivision (e)(1).

the jury must have understood it in that manner (or disregarded Wainer's statement entirely) after viewing the surveillance video footage of the shooting.

We have reviewed the video, and it depicts Albert's right hand holding the gun pointed out of Wainer's office—away from Ramos and Wainer—when Ramos bent over and Wainer pointed his gun at Albert's head. Because the gun was not pointed at Ramos and Wainer when Albert first saw Wainer, if Albert discharged his gun accidentally in response to being startled, that discharge would have travelled away from Ramos, not toward her. Instead, as the video shows, Albert had to move his hand in a 180 degree arc for the gun to be pointed at Ramos. The video permitted the jury to make its own assessment of whether Albert intended to discharge the gun or did so accidentally, and its finding that Albert intentionally discharged his gun when he shot Ramos is therefore supported by the evidence and not undercut by Wainer's use of the term "spooked."

D. Jury Instruction on the Kill Zone Theory and Sufficiency of the Evidence to Support the Attempted Murder Convictions

The People sought to hold defendants accountable for the attempted murder of Ramos under a "kill zone" theory of liability. Defendants contend there is insufficient evidence to show that Albert intended to kill Ramos or to support a "kill zone" theory of liability for her attempted murder. Albert additionally contends that the instruction on the kill zone theory was legally erroneous. Elizabeth joins this contention.

1. Law

A conviction for attempted murder requires proof that the defendant intended to kill the victim and a direct but ineffectual act toward accomplishing that goal. (*People v. Perez* (2010) 50 Cal.4th 222, 229.) Implied malice is not sufficient for attempted murder. (*People v. Stone* (2009) 46 Cal.4th 131, 139-140.) When a defendant is charged with attempting to kill multiple victims, guilt must be determined separately for each alleged victim. (*Id*. at p. 141.) The doctrine of transferred intent, which permits a conviction for murder when a defendant intends to kill a particular victim but instead kills someone else,

does not apply to attempted murder. (*People v. Bland* (2002) 28 Cal.4th 313, 327-328 (*Bland*).) "To be guilty of attempted murder, the defendant must intend to kill the alleged victim, not someone else. The defendant's mental state must be examined as to each alleged attempted murder victim." (*Id*. at p. 328.)

"[A] shooter may be convicted of multiple counts of attempted murder on a 'kill zone' theory where the evidence establishes that the shooter used lethal force designed and intended to kill everyone in an area around the targeted victim (i.e., the 'kill zone') as the means of accomplishing the killing of that victim. Under such circumstances, a rational jury could conclude beyond a reasonable doubt that the shooter intended to kill not only his targeted victim, but also all others he knew were in the zone of fatal harm." (*People v. Smith* (2005) 37 Cal.4th 733, 745-746.)

2. Jury instruction

The jury was instructed on attempted murder pursuant to CALJIC No. 8.66, which states in pertinent part: "In order to prove attempted murder, each of the following elements must be proved: [¶] 1. A direct but ineffectual act was done by one person towards killing another human being; and [¶] 2. The person committing the act harbored express malice aforethought, namely, a specific intent to kill unlawfully another human being."

The jury was also instructed on the kill zone theory of attempted murder with CALJIC No. 8.66.1, entitled "Concurrent intent." That instruction tells the jury: "A person who primarily intends to kill one person, may also concurrently intend to kill other persons within a particular zone of risk. This zone of risk is termed the 'kill zone.' The intent is concurrent when the nature and scope of the attack, while directed at a primary victim, are such that it is reasonable to infer the perpetrator intended to kill the primary victim by killing everyone in that victim's vicinity. [¶] Whether a perpetrator

actually intended to kill the victim, either as a primary target or as someone within a zone of risk is an issue to be decided by you."[17]

3. Analysis

Albert contends CALJIC No. 8.66.1's articulation of the kill zone theory is legally erroneous because it uses the term "zone of risk."

Division One of this Court has criticized the use of the term "zone of risk" in CALJIC No. 8.66.1. (*People v. McCloud* (2012) 211 Cal.App.4th 788, 802, fn. 7 (*McCloud*).) The court stated that "the instruction's repeated references to a 'zone of risk' are misleading and have no basis in the law—neither the phrase 'zone of risk' nor even the word 'risk' appears anywhere in *Bland*." (*Ibid*.) The court explained: "By referring repeatedly to a 'zone of risk,' the instruction suggests to the jury that a defendant can create a kill zone merely by subjecting individuals other than the primary target to a risk of fatal injury . . . [T]hat is not correct."[18] (*Ibid*.)

Under some circumstances, the term "zone of risk" can mislead a jury. In *McCloud*, *supra*, 211 Cal.App.4th 788, for example, the prosecutor obtained 46 convictions for attempted murder, even though the defendants fired only 10 bullets and hit only 3 victims. The figure of 46 was based on the number on people in the crowd. The prosecutor argued that by firing into the crowd, "You are still endangering every single person in that line of fire." (*Id*. at p. 801.) The prosecutor referred to people being "at risk" by being near a victim who was shot, and also referred to people near a car

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[17] In the CALCRIM set of jury instructions, the "kill zone" theory of attempted murder is found in CALCRIM No. 600, entitled "Attempted Murder." It is contained in an optional bracketed paragraph which provides: "[A person may intend to kill a specific victim or victims and at the same time intend to kill everyone in a particular zone of harm or 'kill zone.' In order to convict the defendant of the attempted murder of [name of victim], the People must prove that the defendant not only intended to kill [name of primary target] but also either intended to kill [name of victim], or intended to kill everyone within the kill zone."

[18] The validity of CALJIC No. 8.66.1 is now before the California Supreme Court in *People v. Canizales*, review granted, November 19, 2014, S221958.

which was hit by bullets as being in the "zone of risk." (*Ibid.*) The *McCloud* court found that the prosecutor's argument told the jury that "individuals who are merely endangered or put 'at risk' or located within the 'zone of risk' are attempted murder victims on the kill zone theory[,]" but this was an incorrect statement of the law. (*Id*. at p. 802.) The court noted that CALJIC No. 8.66.1 "directly lends itself to the prosecutor's incorrect statement of the theory." (*Id*. at p. 802, fn. 7.)

The situation before the court in *McCloud* is not the situation before us. Albert was charged with the attempted murder of two victims. He fired more than two shots, and hit both victims. The prosecutor did not argue that Albert could be convicted if he only endangered a victim or put that person at risk, nor did he find it necessary during argument to use the term "zone of risk" at all.[19] Rather, the prosecutor argued that Albert

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[19] We quote the relevant portion of the prosecution's closing argument immediately below. As the statements we have italicized demonstrate, the prosecution accurately stated what the People must prove and what the jury must find to rely on the kill zone theory:

"If you recall in the small office space of Elliott Wainer is where the shooting occurs. Ladies and gentlemen, I propose to you, I argue to you, that that small office space is termed a zone of danger by the law or what is commonly referred to as a kill zone.

"A kill zone arises where the person intends to kill an individual who is nearby or in a group of more than one person. And when the perpetrator attempts to kill his intended target, the others who are nearby are in that kill zone, they are in that zone of danger. The perpetrator intends to kill them as well.

"Let's discuss that. In order to convict the defendant of attempted murder of Veronica Ramos, *the People must prove that the defendant, not only intended to kill Mr. Wainer, but also either intended to kill Veronica Ramos or intended to kill everyone within the kill zone*.

"Veronica Ramos, ladies and gentlemen, was not the intended victim by Albert Chavez; however, she had the unfortunate dilemma of being in the line of fire. When Albert Chavez walked Veronica Ramos at gunpoint into that office looking for more money to take and is surprised by the store owner Elliott Wainer who is awaiting them to come into his office, Albert Chavez immediately starts firing his semi-automatic handgun . . . [*H*]*e intended to kill him in any which way possible, even if it meant having to shoot bullets through Veronica Ramos to do so. That is where the kill zone theory comes into play*. That is why, he is charged, not only with the attempted murder of Elliott Wainer,

had to either intend to kill Ramos or to kill everyone in the office. The prosecutor's theory, in essence, was that in the close confines of Wainer's office, with Ramos in the line of fire between Albert and Wainer, Albert killed Ramos in order to kill Wainer, who was armed. That is a proper articulation of the kill zone theory and it confirms the kill zone instruction given posed no danger of misleading the jury under the circumstances here.

The evidence—particularly the surveillance footage from Wainer's office—is sufficient to support the prosecution's theory of attempted murder. A surveillance camera inside Wainer's office captured the shootings and the video was played for the jury. The camera faces the door the office. When the video begins, it shows a door in the middle of a narrow wall. To the left of the door is a desk; there is little to no space between the door frame and the edge of the desk. To the right of the door is a filing cabinet; there is little space between the edge of the filing cabinet and the door frame. The door swings toward the filing cabinet when opened. Wainer is standing by the wall opposite the desk, next to the filing cabinet. He is holding a gun with both hands.

The office door opens, and Ramos is the first to enter. She just fits in the space between the door and the desk. Albert follows her, but barely fits into the office past the door frame. He has a gun in his right hand, and his right arm is extended back toward the main area of the pawnshop. Both Ramos and Albert are facing toward the desk, and thus away from Wainer. Ramos is between Wainer and Albert. Ramos bends over toward the desk, revealing Wainer standing with his arms extended and a gun pointing toward Albert's head, only a few inches away. Albert swings his right hand holding his gun to his left toward Wainer. The gun moves past Ramos on this trajectory. She crumples to the ground, leaving Albert and Wainer face to face. With his gun pointed toward Wainer, Albert appears to fire the gun as he backs out of the office and Wainer falls backward.

Based on the video evidence, the jury had an ample basis to conclude that Albert intended to kill Ramos in order to kill Wainer. Albert's shooting of Ramos caused her to

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but also of Veronica Ramos. He did not care who he had to kill in order to neutralize the threat behind that door."

drop to the ground, out of the way, giving him a clear line of fire at Wainer as Albert retreated. Further, because Albert began firing his gun before he had a clear shot at Wainer, the jury also had a basis to infer that Albert intended to kill everyone in the vicinity, which in this case meant Ramos, to make sure that he killed Wainer. This is sufficient evidence to support the attempted murder convictions.

Albert protests that the evidence does not permit an inference of such calculated thought. He notes that Ramos testified that she bent down to open the desk drawer, noticed that she could see a reflection of Wainer behind the door and of Albert's face "and then he shot me." She described the events as occurring "very fast." Wainer testified that he believed that when Ramos leaned over to get the cash, "I believe [Albert] got spooked and a fire went off, a shot went off." We reject this argument, for as we explained *ante*, at pages 24 and 25, Wainer's testimony that Albert "got spooked" does not compel a finding that he fired at Ramos and Wainer accidentally or unthinkingly.

E. Double Punishment Sentencing Claim

Albert contends the trial court erred in imposing consecutive sentences for both the robbery and attempted murder convictions involving Ramos and Wainer. He asserts the attempted murders occurred during the commission of the robbery and were incidental to it, and so section 654[20] does not permit the imposition of sentence on both convictions. Elizabeth joins this contention.

We reject respondent's contention that defendants have forfeited their section 654 claim by failing to object in the trial court. "'[T]he waiver doctrine does not apply to questions involving the applicability of section 654. Errors in the applicability of section 654 are corrected on appeal regardless of whether the point was raised by objection in the trial court or assigned as error on appeal.' (*People v. Perez* (1979) 23 Cal.3d 545, 549-

[20] Section 654, subdivision (a), provides in pertinent part: "An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision."

550, fn. 3.)" (*People v. Hester* (2000) 22 Cal.4th 290, 295, also citing *People v. Scott* (1994) 9 Cal.4th 331, 354, fn. 17.)

"The purpose of section 654 is to prevent multiple punishment for a single act or omission, even though that act or omission violates more than one statute and thus constitutes more than one crime. Although the distinct crimes may be charged in separate counts and may result in multiple verdicts of guilt, the trial court may impose sentence for only one offense—the one carrying the highest punishment. (3 Witkin & Epstein, Cal. Criminal Law (2d ed. 1989) Punishment for Crime, § 1382, p. 1625.)" (*People v. Liu* (1996) 46 Cal.App.4th 1119, 1134.) "'[I]f all of the offenses were merely incidental to, or were the means of accomplishing or facilitating one objective, defendant may be found to have harbored a single intent and therefore may be punished only once. [(*People v. Harrison* (1989) 48 Cal.3d 321, 335.)]" (*People v. Palmore* (2000) 79 Cal.App.4th 1290, 1297.)

It is well settled that a shooting is incidental to a robbery when the defendant's only intent or objective for the shooting is to facilitate the robbery. (See *People v. Hensley* (2014) 59 Cal.4th 788, 832.) An act of violence is not incidental to a robbery, however, when it exceeds that force necessary to commit the robbery. (*People v. Cleveland* (2001) 87 Cal.App.4th 263, 272.) An act of gratuitous violence against a helpless and unresisting victim is also not considered incidental for the purposes of section 654. (See, e.g., *People v. Phong Bui* (2011) 192 Cal.App.4th 1002, 1016.)

Wainer was not a helpless and unresisting victim. He armed himself and waited in the office where the cash was kept. When the door opened, Wainer pointed his gun at Albert's head. Wainer must be classified as a resisting victim, and his resistance occurred while the robbery was ongoing. Albert's shooting of Wainer must therefore be characterized as incidental to the robbery, and defendants cannot be punished for both the robbery and the attempted murder of Wainer.

Ramos did not personally resist the robbery. She was, however, shot to facilitate the robbery. The prosecution relied on a kill zone theory of liability to show Albert's intent in shooting Ramos. The prosecutor's theory, in essence, was that in the close

confines of Wainer's office, with Ramos in the line of fire between Albert and Wainer, Albert attempted to kill everyone present in order to kill the resisting and armed Wainer. Thus, Albert's intent in shooting Ramos was to facilitate the robbery by eliminating Wainer. Under these circumstances, shooting Ramos was "necessary" to accomplish the robbery. Thus, her shooting must also be characterized as incidental to the robbery, and defendants cannot be punished for both the robbery and the attempted murder of Ramos.

Section 654 provides for punishment to be imposed under the provision which provides for the longest term of imprisonment. Accordingly, defendants' sentences for the count one robbery of Wainer and the count 2 robbery of Ramos are ordered stayed pursuant to section 654.

F. Albert's Cruel and Unusual Punishment Claim

Albert contends his sentence constitutes cruel and unusual punishment under the United States and California constitutions.

Albert did not object in the trial court that his punishment was cruel and unusual. The issue of whether a defendant's sentence is cruel and unusual punishment is a fact intensive one, and is based on the nature and facts of the crime and offender. (*People v. Weddle* (1991) 1 Cal.App.4th 1190. 1196; see also *Solem v. Helm* (1983) 463 U.S. 277, 287 [question of disproportionate punishment cannot be considered in the abstract].) It is forfeited if not raised in the trial court. (*People v. Kelley* (1997) 52 Cal.App.4th 568, 583; *People v. DeJesus* (1995) 38 Cal.App.4th 1, 27; see generally *People v. Trujillo* (2015) 60 Cal.4th 850, 856 [reaffirming that even constitutional claims can be forfeited]; *People v. Scott* (1994) 9 Cal.4th 331, 356.)

Albert contends in his reply brief that we have discretion to consider his claim because it involves a question of law. (See *People v. Gutierrez* (2014) 58 Cal.4th 1354, 1368; *People v. Hamlin* (2009) 170 Cal.App.4th 1412, 1474.) His argument about his own personal culpability, however, does not involve a question of law.

As Albert acknowledges, the trial court found no mitigating circumstances at sentencing. That is a finding of fact. On appeal, Albert asks us to conclude that there are

mitigating factors in the record he did not argue to the trial court and the trial court did not consider. The failure to raise these factors below is reason enough for us to reject them, but Albert's characterization of the factors also ignores the import of the jury's verdicts or his own admissions of wrongdoing. He claims that the evidence did not show he had an intent to kill. The jury found he did. He points out that he testified he had abandoned gang membership, but the court necessarily found he was still a gang member at the time of the offenses. He contends he was "working and attending college," but by his own admission part of his "work" was buying and selling stolen jewelry. We accordingly hold the contention is forfeited.

In any event, on the record before us, there is no basis to find Albert's aggregate sentence violates the Eighth Amendment. (See, e.g. *United States v. Hungerford* (9th Cir. 2006) 465 F.3d 1113, 1117-1118 [159 year term of imprisonment for seven armed robberies, including six mandatory minimum 25-year consecutive sentence enhancements for using or carrying a firearm during a crime of violence, does not violate the Eighth Amendment][21]; see also *Ewing v. California* (2003) 538 U.S. 11 [25-year-to-life sentence under Three Strikes Law for nonviolent felony did not violate the Eighth Amendment]; *Harmelin v. Michigan* (1991) 501 U.S. 957, 994 [life sentence without the possibility of parole for drug possession did not violate the Eighth Amendment].)

Nor do we see a basis under Article I, section 17 of the California Constitution to hold the sentence must be reversed. The sentence imposed is not grossly disproportionate to Albert's conduct: victimizing nine individuals, leaving Ramos permanently paralyzed and unable to care for herself, and causing Wainer to suffer problems with his intestines, legs, arm, and "daily nightmares" even at the time of trial. (*People v. Byrd* (2001) 89

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[21] Judge Reinhardt, concurring that precedent required rejection of Hungerford's cruel and unusual punishment claim, nevertheless opined the imposition of the six mandatory consecutive 25-year terms resulted in an "irrational . . . and absurd . . . sentence." (*United States v. Hungerford, supra*, 465 F.3d at p. 1118.) He implored "those who have both the power and the responsibility to do so," to consider sentencing reform that would restore controlling principles of fairness, proportionality, and informed discretion. (*Id.* at pp. 1118-1119.)

Cal.App.4th 1373, 1382-1383 [sentence of 115 years plus 444 years to life not cruel or unusual, despite the defendant's inability to serve the sentence during his lifetime, where defendant committed 12 armed robberies and "shot, severely wounded, and permanently disabled an innocent victim in one of them"]; see also *People v. Retanan* (2007) 154 Cal.App.4th 1219, 1231 [rejecting argument that 135-to-life sentence is cruel and unusual punishment because it is substantially longer than the defendant's possible life span]; *People v. Cartwright* (1995) 39 Cal.App.4th 1123, 1130, 1136 [rejecting defendant's cruel or unusual punishment claim based on contention crimes left no permanent physical injury, and upholding sentence of 53-year determinate term plus 15 indeterminate terms of 25 years to life for sexual assault "crime spree"]; *People v. Weddle*, *supra*, 1 Cal.App.4th at pp. 1197-1198 [determination of cruel and unusual punishment requires consideration of the nature of the offender].)

To the extent Albert contends his sentence is disproportionately harsh as a matter of law when compared with the sentence for murder, such a comparison is inapt. While it is true that the penalty for first degree murder is 25 years to life, that is the sentence for a murderer with no criminal history who commits a single crime and who does not use a firearm to do so. If the murderer were a recidivist, used a firearm or committed multiple crimes, the sentence would be much longer.[22]

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[22] Albert appears to suggest his sentence would not constitute cruel and unusual punishment if he were sentenced concurrently for crimes that occurred at the same location. This would result in a determinate sentence of 25 years for the Oasis Jewelry incident. For the pawnshop incident, the determinate sentence would be 10 years, plus a 25-to-life enhancement term pursuant to section 12022.53, subdivision (d). Combined, the sentences for the two sets of crimes would be 60 years to life, which would still exceed his life expectancy.

Albert also cites the Supreme Court's decision in *Miller v. Alabama* (2012) 132 S. Ct. 2455 in support of his request that we hold his sentence unconstitutional. *Miller* is inapposite because its holding applies only to juvenile offenders (*id.* at p. 2460), and such offenders are in a separate class and warrant different treatment from adult offenders. As Albert concedes, he was 30 years old at the time of the offense.

If Albert's crimes are considered individually, not one exceeds the penalty for murder committed with a firearm, which would result in a sentence of 50 years to life in prison. Albert's sentence is more lengthy than a murderer's because it is an aggregate sentence which results from a combination of factors: (1) Albert committed robberies on two separate occasions, each of which involved multiple victims; (2) he is a recidivist,[23] which doubled the sentences for the underlying convictions and required the imposition of a five-year enhancement term pursuant to section 667, subdivision (a); and (3) he used a firearm in commission of the robberies.

G. Elizabeth's Request that We Construe Section 12022.53 to Forbid Vicarious Liability for Her

Elizabeth contends the imposition of six consecutive 25-year-to-life terms, totaling 150 years to life, is not commensurate with her culpability for aiding and abetting the robberies in which two people were seriously injured but no one died. She implores us construe section 12022.53, subdivisions (d) and (e)(1) in a manner to preclude a "de facto LWOP" sentence for a principal whose liability is completely vicarious. She proposes we interpret section 12022.53, subdivisions (d) and (e)(1) to require a finding that the vicariously liable principal exhibited reckless indifference to human life as a prerequisite to imposing more than one enhancement term pursuant to section 12022.53, subdivisions (d) and (e)(1).

We see no basis to so construe the statute. As Elizabeth acknowledges, the California Supreme Court has upheld the imposition of a 25-year-to-life enhancement term for a defendant who was not the shooter. (*People v. Garcia* (2002) 28 Cal.4th 1166 (*Garcia*).) Nothing in *Garcia* requires a showing of reckless indifference to human life by the vicariously liable defendant.

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[23] The Supreme Court has rejected Eighth Amendment challenges to state statutory schemes providing increased punishment for recidivists. (See, e.g., *Ewing v. California*, *supra*, 538 U.S. 11; *Rummel v. Estelle* (1980) 445 U.S. 263, 268.)

Elizabeth contends, however, that two recent California Supreme Court decisions support her position by recognizing the need to calibrate punishment to a criminal's mens rea. (*People v. Banks* (2015) 61 Cal.4th 788 (*Banks*); *People v. Chiu* (2014) 59 Cal.4th 155 (*Chiu*).) She asserts the reasoning of these cases requires us to adopt a "narrow construction" of section 12022.53, subdivisions (d) and (e)(1) that calibrates the punishment imposed to her culpability. This calibration, in her view, requires a showing of reckless indifference to human life for the imposition of more than one 25-year-to-life enhancement term because of the severity of the resulting sentence.

We reject Elizabeth's argument for the most fundamental of reasons: neither *Banks* nor *Chiu* involves section 12022.53, much less a holding that the statute should be construed in a manner different than its text would otherwise suggest. Moreover, and as we explain, the rationale in neither case applies by extension to the facts at issue here.

In *Banks*, our Supreme Court addressed the circumstances under which a defendant who lacks intent to kill may qualify as a "major participant" under section 190.2, subdivision (d), and thus be eligible for the death penalty or an LWOP sentence. (*Banks*, 61 Cal.4th at pp. 794, 804.) Looking to United States Supreme Court authority that served as the source of the statutory language,[24] the *Banks* court held that a qualifying defendant must be a major participant, as that term is used in common parlance, and must act with "reckless indifference to human life." (*Id.* at pp. 800-801.) The court explained these requirements create a spectrum of culpability, with on one extreme a mere getaway driver "like 'Enmund himself: the minor actor in an armed robbery, not on the scene, who neither intended to kill nor was found to have had any culpable mental state," and on "the other extreme [] actual killers and those who attempted or intended to kill." (*Id.* at p. 800.) To decide where on that spectrum a given defendant falls, our Supreme Court identified a series of factors including: the role the defendant had in planning the crime; the role the defendant had in supplying or using lethal weapons; the defendant's awareness of particular dangers posed by the nature of the crime, weapons used, or the

[24] See *Tison v. Arizona* (1987) 481 U.S. 137 and *Enmund v. Florida* (1982) 458 U.S. 782.

past experience of other participants; whether the defendant was present at the scene of the killing in a position to facilitate the crime; whether the defendant's actions or inaction played a role in the death of a victim; and any facts concerning what the defendant did after lethal force was used. (*Id.* at p. 803; see also *id.* at p. 801 ["apparent consensus" that substantial participation in violent felony under circumstances likely to result in loss of life demonstrates reckless indifference to a significant risk of death].)

Here, even though *Banks* is inapplicable because section 190.2 is not at issue, we have no difficulty concluding the rationale in that case would compel a conclusion Elizabeth's participation in the pawnshop robbery falls nowhere near the mere-getaway-driver-end of the culpability spectrum. Elizabeth was present at the scene in a position to facilitate the crime, armed with a gun of her own, aware that she had committed a prior robbery (of Oasis Jewelry) where both she and Albert threatened to use their guns to kill employees, and she fled with Albert after he shot and paralyzed Ramos rather than assisting the victim or calling for help. Thus, even if we did construe section 12022.53 with reference to the holding in *Banks*, Elizabeth would find no refuge in the facts that demonstrate her degree of culpability for the pawnshop robbery.

Elizabeth's reliance on the rationale in *People v. Chiu*, *supra*, 59 Cal.4th 155 is also misplaced. The *Chiu* court explained that the legitimate public policy concern of deterring aiders and abettors from encouraging commission of offenses that would naturally, probably, and foreseeably result in an unlawful killing loses its force in the context of *premeditated* murder. (*Id.* at p. 165.) That is because the premeditative mental state is "uniquely subjective and personal" and has no effect on the resultant harm—"[t]he victim has been killed regardless of the perpetrator's premeditative mental state." (*Id.* at p. 166 [acknowledging prior decision, not involving premeditated murder, holding an aider and abettor's "punishment need not be finely calibrated to the criminal mens rea"].) By contrast, the public policy concern of deterrence applies with full force and in no way depends on a uniquely subjective and personal determination when a section 12022.53 enhancement is at issue; rather, the applicability of the enhancement

turns on the objective harm caused by the perpetrator—in this case, Albert's discharge of a firearm that caused great bodily injury.

The rationale in *Chiu* is also inapposite here because this case involves a sentencing enhancement enacted by the Legislature, not a court's determination of how a legal doctrine not enshrined in statute (in *Chiu*, the natural and probable consequences doctrine) should apply. (*Id.* at p. 164.) The *Chiu* court reached the decision it did by expressly relying on the fact that no determination of legislative intent was necessary to resolve the issue then before it. (*Id.* at p. 163 ["[T]he issue in the present case does not involve the determination of legislative intent as to whom a statute applies"].) Here, by contrast, we are bound by the Legislature's intention in enacting section 12022.53, and as prior cases have held, the Legislature intended to impose vicarious liability on non-shooters who are found to have assisted in criminal conduct by gang members.[25] (§§ 12022.53, subd. (e)(1), 186.22, subd. (b)(1); *Garcia, supra*, 28 Cal.4th at p. 1176 ["Section 12022.53, subdivision (e)(1), expressly extends liability to aiders and abettors to crimes by a principal armed with a gun, for crimes committed in furtherance of the purposes of a criminal street gang. Its legislative history clearly reveals that this was the Legislature's intent"]; see also *People v. Palacios* (2007) 41 Cal.4th 720, 733 [imposition of three 25-year-to-life enhancement terms served Legislature's goal of deterring the use of firearms]; *People v. Oates* (2004) 32 Cal.4th 1048, 1055, 1057-1058.)

Elizabeth further contends we should construe section 12022.53, subdivision (e)(1) to preclude liability where the shooter, here Albert, is not found to have violated section 186.22, subdivision (b). She also asserts we should construe subdivision (e)(1) to

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[25] The *Chiu* court's statement that its holding did not apply to felony murder is further evidence that the decision has no application here. In the case of first-degree felony murder, the Legislature has determined that the "deterrent purpose outweighs the normal legislative policy of examining the individual state of mind of each person causing an unlawful killing to determine whether the killing was with or without malice, deliberate or accidental, and calibrating our treatment of the person accordingly." (*People v. Cavitt* (2004) 33 Cal.4th 187, 197; accord *People v. Wilkins* (2013) 56 Cal.4th 333, 346 [felony-murder rule "does not take into account the relative culpability of the defendant's actions or state of mind"].)

require that the crimes were committed "in furtherance of the objectives of a criminal gang." The Legislature was free to place such restrictions in subdivision (e)(1), but did not. The Legislature required only that the aider and abettor violate section 186.22, subdivision (b). That statute is violated, as here, by crimes committed in association with a criminal street gang.

Nothing in *People v. Garcia*, *supra*, 28 Cal.4th 1166 requires otherwise. Although the Garcia court states that the purpose of subdivision (e)(1) is to punish crimes committed "in furtherance of" the "objectives" or the "purposes" of a criminal street gang (*id*. at p. 1172) the court also states that subdivision (e)(1) "imposes vicarious liability under this section on aiders and abettors who commit crimes in participation [with] a criminal street gang." (*Id*. at p. 1171.) *Garcia* does not restrict the violations of section 186.22, subdivision (b) which can trigger application of subdivision (e)(1). And as for Elizabeth's complaint that Albert was not found to have violated section 186.22, the *Garcia* court "emphasize[d] that '"[t]he fact that certain defendants may escape conviction for their crimes is not any legal or logical reason why another defendant, where substantial evidence has been introduced to sustain his conviction, should be exonerated and be permitted to escape punishment for his crime." [Citation.]' (*People v. Palmer* (2001) 24 Cal.4th 856, 861.)" (*People v. Garcia*, *supra*, 28 Cal.4th at p. 1178.)

H. Elizabeth's Equal Protection and Cruel and Unusual Punishment Claims

We have reversed the true findings on the section 186.22 gang allegations for the counts involving the Oasis Jewelry victims, and we have held the sentences for the count one and two robberies must be stayed. Under the circumstances, we remand to the trial court for resentencing of Elizabeth consistent with these holdings. Because we remand for resentencing, we do not reach Elizabeth's argument that the original sentence imposed is unconstitutional as a violation of equal protection or of constitutional guarantees against cruel and/or unusual punishment. If, after remand and resentencing, Elizabeth continues to contend the sentence imposed is unlawful, she is free to assert a new challenge based on the new sentencing proceeding.

I. Conceded Error in Certain Fines

Defendants contend, and respondent agrees, the trial court erred in imposing a restitution fine of $20,000 pursuant to section 1202.4, subdivision (b). We likewise agree. At the time of the robberies, the maximum fine amount permitted by that section was $10,000. (*People v. Kramis* (2012) 209 Cal.App.4th 346, 349.) The trial court expressed its intent to impose the maximum fine. Accordingly, we will order the abstract of judgment corrected to reflect that amount.

The parole revocation fine must be in the same amount as the section 1202.4 fine. (§ 1202.45, subd. (a).) Accordingly, the abstract of judgment must be corrected to show a section 1202.45 fine of $10,000, stayed.

DISPOSITION

Albert's count 1 and count 2 robbery sentences and accompanying enhancements are ordered stayed pursuant to section 654. The section 1202.4 restitution fine imposed on Albert is ordered corrected to $10,000. The section 1202.45 parole revocation fine is also ordered corrected to $10,000, and is stayed. The clerk of the superior court is directed to prepare an amended abstract of judgment for Albert and to deliver a copy to the Department of Corrections and Rehabilitation. The judgment as to Albert is affirmed in all other respects.

As to Elizabeth, the convictions are affirmed on all counts. The trial court's true findings on the section 186.22 allegations associated with counts 1 through 7 are affirmed, as are the true findings on the section 12022.53 sentencing enhancements. The true findings on the section 186.22 allegations associated with counts 9 through 12 are reversed. The trial court is directed to resentence Elizabeth in accordance with the views expressed in parts II.B, II.E, and II.I of this opinion.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

BAKER, J.

We concur:

TURNER, P.J.

KUMAR, J.*

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.